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DEPARTMENT OF EDUCATION

34 CFR Part 200

RIN 1810-AB49

[Docket ID ED-2018-OESE-0079]

Title I-Improving the Academic Achievement of the Disadvantaged; Education of Migratory Children

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department proposes to modify the current requirements related to the responsibilities of State educational agency (SEA) recipients of funds under title I, part C, of the Elementary and Secondary Education Act of 1965, as amended (ESEA), to conduct annual prospective re-interviews to confirm the eligibility of children under the Migrant Education Program (MEP). Based on input from MEP stakeholders, we propose to clarify who constitutes an independent re-interviewer, and to reduce the costs and burden of prospective re-interviews conducted by independent re-interviewers, while maintaining adequate quality control measures to safeguard the integrity of program eligibility determinations.

DATES: We must receive your comments on or before [INSERT

DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "Help."

- Postal Mail, Commercial Delivery, or Hand Delivery: The Department strongly encourages commenters to submit their comments electronically. However, if you mail or deliver your comments about these proposed regulations, address them to Patricia Meyertholen, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E315, Washington, DC 20202.

Privacy Note: The Department's policy is to make all comments received from members of the public available for

public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Patricia Meyertholen, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E315, Washington, DC 20202. Telephone: (202) 260-1394. Email: patricia.meyertholen@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Catalog of Federal Domestic Assistance (CFDA) Number: 84.011.

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory

burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments in person in room 3E315, 400 Maryland Avenue, SW., Washington, DC, between 8:30 a.m. and 4:00 p.m., Eastern Time, Monday through Friday of each week except Federal holidays. Please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background and Proposed Regulations

The Secretary proposes to amend the regulations in 34

CFR 200.89(b)(2), which pertain to an SEA's responsibilities for conducting annual prospective re-interviews for children determined to be eligible for the MEP, as part of the SEA's quality control system.

Final requirements for prospective re-interviewing were published in the *Federal Register* on July 29, 2008 (73 FR 44102), and became effective on August 28, 2008. In accordance with these requirements, SEAs must, on an annual basis, validate current-year child eligibility determinations through re-interviews for a randomly selected sample of children previously identified as migratory. Under §200.89(b)(2)(i), at least once every three years, the annual prospective re-interviews must be conducted by one or more independent re-interviewers--that is, interviewers who are neither SEA nor local operating agency staff working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested. The current regulations do not specify who may conduct the annual prospective re-interviews in the years when an independent re-interviewer is not required. However, the Department has previously recommended to SEAs through guidance and technical

assistance¹ that the independent re-interviewer should not have been involved in the initial eligibility determination under review.

Prospective re-interviewing is required in order to provide a quality control on the accuracy of an SEA's current-year eligibility determinations (i.e., migratory children for whom the SEA approved a Certificate of Eligibility during the current performance reporting period) and to guide any needed corrective actions or improvements in a State's migratory child identification and recruitment practices. Prospective re-interviewing is one element of an SEA's quality control system, which must also include the minimum requirements set forth in 34 CFR 200.89(d), such as training for recruiters and staff involved in making eligibility determinations, and supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

The 2008 requirements stemmed from the Department's concerns about the accuracy and consistency of the processes SEAs had used to determine the eligibility of

¹ See pages 35-36 of U.S. Department of Education, Office of Elementary and Secondary Education, Office of Migrant Education, *Technical Assistance Guide on Re-interviewing*: Washington, D.C., 20202 (<https://results-assets.s3.amazonaws.com/tools/mep-reinterviewing-guide-dec-10.pdf>).

migratory children and the counts of children eligible for services that SEAs reported to the Department, which were examined in 2004 by the Office of Elementary and Secondary Education and the Office of Inspector General. The examination uncovered widespread errors in program eligibility determinations. In most cases, the errors seemed attributable to the poor training of State and local personnel responsible for determining eligibility, weak quality control procedures for reviewing child eligibility determinations, and a lack of uniformity in the implementation of the MEP eligibility requirements.

Although the accuracy and integrity of program eligibility determinations has vastly improved since 2008, we believe prospective re-interviews remain an essential part of an SEA's quality control system. Maintaining adequate quality control in eligibility determinations is essential to ensuring that MEP-funded services are provided to children who meet the program eligibility criteria, and that the level and quality of those services is not diluted by the delivery of services to children who are not eligible to receive them. In addition, the number of eligible migratory children, as reported by SEAs, is a key factor in determining the amount of MEP funds awarded to SEAs.

We are proposing these amendments to clarify for SEAs that individuals conducting annual prospective re-interviews must be individuals who were not involved in the initial eligibility determination being reviewed, as a quality control measure. This proposed change would codify the method the Department has previously recommended to SEAs through guidance and technical assistance, and is largely consistent with SEAs' current practices. To avoid confusion, the proposed regulations also replace the reference to "current-year" eligibility determinations with the term "current performance reporting period (September 1 to August 31)." A performance reporting period, sometimes referred to as a child count year, is a more specific timeframe: September 1 through August 31. This modification to the regulatory language is consistent with the Department's technical assistance and guidance on prospective re-interviewing, as well as SEAs' current re-interviewing practices. By adding these clarifications to the regulations, we intend to make this information as transparent and accessible as possible.

We also propose to modify the requirement that SEAs use independent re-interviewers at least once every three years. Instead, the regulations would require the use of independent re-interviewers at least once within the first

three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change, as determined by the Secretary, that impacts program eligibility, in order to test eligibility determinations made based on the changed eligibility criteria. The entire sample of eligibility determinations to be tested by independent re-interviewers would be drawn from children determined to be eligible after the major statutory or regulatory change takes effect. This change would reduce the frequency of the required use of independent re-interviewers because after using independent re-interviewers at least once within the first three full performance reporting periods following a major statutory or regulatory change, SEAs would not be required to use independent re-interviewers again until an additional major statutory or regulatory change is implemented that impacts child eligibility. We believe that, by providing an impartial perspective from outside of the program, independent re-interviewers continue to be valuable, but that their perspective would be most beneficial in periods when changes to program eligibility have been recently implemented. We believe that independent re-interviewers' distance from the State or local administration and operation of the program makes

them more likely to identify errors or misunderstanding of new or changed eligibility criteria--particularly if those issues are systemic or statewide. After independent re-interviewers identify eligibility issues and the SEA has implemented corrective actions or improvements, as required by current regulations in 200.89(b)(2)(vii), we believe sufficient quality control can be maintained by the SEA's annual prospective re-interviews, which may be conducted by SEA or local staff operating the MEP, as long as those staff members did not work on the initial eligibility determinations being tested. Finally, we propose to make this requirement effective September 1, 2020, to allow SEAs that receive MEP funds to complete their independent re-interviews of eligibility determinations that were made after the effective date (July 1, 2017) of the Every Student Succeeds Act.

Public Participation

In accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda," the Department requested input from the public and identified stakeholders on existing program regulations. As part of that effort, on June 1, 2017, OESE staff contacted two of the largest national organizations representing State MEP directors to request input on whether, in their area of expertise, there

are regulations that are unnecessary or in need of revision, and whether there are regulations that are particularly important for the Department to keep in place. In response to this outreach, we received responses from one organization, as well as MEP staff in one SEA. Their proposed alternatives to the current prospective re-interviewing requirements included modifying the timing, reducing the frequency, or reducing the number of re-interviews that SEAs are required to complete.

On June 22, 2017, the Department published in the *Federal Register* a notice of evaluation of existing regulations (82 FR 28431), requesting input on regulations that may be appropriate for repeal, replacement, or modification. In response to this notice, we received comments from the same national organization representing State MEP directors that previously responded to the Department's June 1, 2017, outreach. That organization again proposed alternatives to the current prospective re-interviewing requirements, such as modifying the timing, reducing the frequency, or reducing the number of re-interviews that SEAs are required to complete.

In addition, we have received input during ongoing consultation with State MEP directors on possible modifications to the prospective re-interviewing

requirements. Most recently, we received input during a November 14, 2017, meeting with the MEP Coordination Work Group, a group of nine State MEP directors who represent State MEP directors in nine U.S. geographic regions.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the

rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For Fiscal Year 2019, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The proposed regulations are not a significant regulatory action. Therefore, the requirements of Executive Order 13771 do not apply.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as

possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these proposed regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these proposed regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those regulatory requirements that we have determined to be necessary for administering the Department's programs and activities.

We anticipate that the proposed changes to these regulations will reduce the cost and burden associated with prospective re-interviewing, specifically the use of independent re-interviewers, for some SEAs. While we believe that SEAs will be required to conduct independent re-interviews less frequently under the proposed regulations than they are required to currently, we cannot predict when statutory changes will occur. Under the current and proposed regulations, to qualify as "independent," the interviewers must be neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested. Although there is no Federal requirement for SEAs to use a specific funding mechanism to support independent re-interviewers, such as a contract, or to use out-of-State personnel who require travel costs, several SEAs have chosen to use such methods and personnel for independent re-interviews. For those SEAs that have chosen to use more costly methods for independent re-interviews, we anticipate that the reduced frequency of independent re-interviews will result in reduced cost and burden. Further, we do not believe that burden will be affected by the proposed change to clarify that annual prospective re-interviews must not

be conducted by individuals who were involved in the initial eligibility determination being reviewed, as this is consistent with the current practices of most SEAs.

Elsewhere in this section under Paperwork Reduction Act of 1995, we identify and explain burdens specifically associated with information collection requirements.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a

numbered heading; for example, §200.89.)

- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?

- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. Because these proposed regulations would affect only States and State agencies, the proposed regulations would not have an impact on small entities. State and State agencies are not defined as "small entities" in the Regulatory Flexibility Act.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in

accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

These proposed regulations contain information collection requirements that are approved by OMB under OMB control number 1810-0662; these proposed regulations do not affect the currently approved data collection.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

Section 200.89(b)(2) contains an information collection requirement. This information collection has been approved by OMB Control Number 1810-0662. The

currently approved collection includes cost and burden estimates based on annual prospective re-interviewing which do not vary based on the specific personnel used for re-interviews, including independent re-interviewers. As SEAs would still be required to conduct prospective re-interviews on an annual basis under the proposed regulations, our cost and burden estimates are unchanged.

We estimate a standard number of hours to conduct re-interviews--including multiple attempts to locate the family and travel to their location (2 hours/child), analyze the findings (1 hour/child), and summarize findings for annual reporting (2 hours/SEA). We estimate costs based on a standard hourly rate for staff conducting re-interviews (\$10/hour) and a higher standard hourly rate for staff responsible for analysis and reporting (\$25/hour). Some SEAs have elected to use more costly resources and methods when conducting independent re-interviews, such as contracts with private organizations and out-of-State personnel. Since these are not Federal requirements, under the PRA, any increased costs associated with these resources and methods were not factored into the cost and burden estimates in the currently approved collection, and, accordingly, any decreased costs associated with these resources and methods that would result from their less

frequent use under the proposed regulations also do not affect the cost and burden estimates. Thus, the burden estimated in the approved information collection remains unchanged.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations in §200.89(b) may have federalism implications. We encourage

State and local elected officials to review and provide comments on these proposed regulations.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations via the Federal Digital System at: www.gpo.gov/fdsys. At this site you can view this document, as well as all other documents of this Department published in the *Federal Register*, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. (Catalog of Federal Domestic Assistance number 84.011: Education of Migratory Children)

List of Subjects in 34 CFR Part 200

Education of disadvantaged, Elementary and secondary education, Grant programs-education, Indians-education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

Dated: November 23, 2018.

Betsy DeVos,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200--TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

1. The authority citation for part 200 continues to read as follows:

AUTHORITY: 20 U.S.C. 6301 through 6576, unless otherwise noted.

2. Section 200.89 is amended by:

- a. Revising paragraph (b)(2).
- b. Adding paragraph (b)(3).
- c. Revising the authority citation.

The revisions and addition read as follows:

§ 200.89 Re-interviewing; Eligibility documentation; and Quality control.

* * * * *

(b) * * *

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in §200.89(d), an SEA must annually validate child eligibility determinations from the current performance reporting period (September 1 to August 31) through re-interviews for a randomly selected sample of children identified as migratory during the same

performance reporting period using re-interviewers, who may be SEA or local operating agency staff members working to administer or operate the State MEP, or any other person trained to conduct personal interviews and who understands program eligibility requirements, but who did not work on the initial eligibility determinations being tested. In conducting these re-interviews, an SEA must---

(i) Use one or more independent re-interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements) at least once every three years until September 1, 2020;

* * * * *

(3) *Prospective re-interviewing following a major statutory or regulatory change to child eligibility.*

Beginning September 1, 2020, an SEA must use one or more independent re-interviewers (i.e., interviewers who are neither SEA nor local operating agency staff members working to administer or operate the State MEP, nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct

personal interviews and to understand and apply program eligibility requirements) to validate child eligibility determinations at least once within the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change that directly impacts child eligibility (as determined by the Secretary), consistent with the prospective re-interview process described in paragraph (b)(2)(ii)-(vii) of this section. The entire sample of eligibility determinations to be tested by independent re-interviewers must be drawn from children determined to be eligible after the major statutory or regulatory change took effect.

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(Authority: 20 U.S.C. 6391-6399, 6571, 18 U.S.C. 1001)

[FR Doc. 2018-25931 Filed: 11/28/2018 8:45 am; Publication Date: 11/29/2018]